

Ireland Update: A Look at the Screening of Third Country Transactions Bill

The Screening of Third Country Transactions Bill 2022 ("Bill"), published by the Irish Government on 2 August 2022, aims to implement the first screening process for foreign direct investment ("FDI") in Ireland.

The Bill will require that certain investments in critical Irish industries that may present risks to the State's security or public order be reviewed by the Minister for Enterprise, Trade and Employment ("Minister").

The Bill's publication follows on from the EU Regulation (EU) 2019/452 establishing an FDI screening scheme, which addresses EU Member State concerns on the purchase of strategic European undertakings by third country (i.e. any non-EU / EEA country other than Switzerland) undertakings, while maintaining the EU's strong support for FDI.

Transactions in Scope

Under the Bill, there is mandatory reporting obligation for transactions that meet certain criteria, namely where:

- A third country national, third country undertaking or a person connected with such an undertaking is party to the transaction;
- The value of the transaction is at least €2 million;
- The transaction directly or indirectly relates to, or impacts upon, one or more areas likely to affect security or public order, including:

- Critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence;
- Critical technologies, including artificial intelligence, robotics, cybersecurity, aerospace and defence;
- Supply of critical inputs, including energy or raw materials, as well as food security;
- Access to sensitive information, including personal data, or the ability to control such information; or
- The freedom and pluralism of the media.

- The transaction relates, directly or indirectly, to an asset or undertaking in the State; and
- The percentage of shares / voting rights held by the undertaking as a result of the transaction changes from:
 - 25% or less to more than 25%; or
 - 50% or less to more than 50%.

Importantly, the Minister has the power to 'call in' a transaction for review even if the criteria above have not been met where the Minister has reasonable grounds to believe that the transaction might impact security or public order. The Minister must exercise this call in power within 15 months of the completion of the transaction.

Notification Requirements

The Bill places responsibility for notification on all parties to a relevant transaction and the notification must be made to the Minister no less than 10 days before the transaction completion date. All parties will be deemed compliant with this notification obligation when one party makes the necessary notification with agreement of the other parties.

The notification must be accompanied by certain information, such as the:

- Identities of the parties;
- Ownership structure of the parties to the transaction;
- Approximate transaction value; and
- Funding of the transaction and its source.

If the Minister determines that further information is required, a request can be made and information must be provided within a period of no less than 30 days.

Failure to Notify Consequences

Failure to notify the Minister of a relevant transaction or to provide accurate information, will be a criminal offence, carrying a penalty of up to €2,500 or six months imprisonment on summary conviction or to a fine not exceeding €4 million and / or up to five years imprisonment on indictment.

Transactions that fall within the mandatory reporting scheme but were not notified to the Minister may be reviewed for up to five years post-completion, or up to six months after the Minister first became aware of the transaction.

Review and Appeals Process

The Minister shall review the transaction and issue a decision within 90 days of notification of the transaction or by a set date that is not more than 135 days from the notification date.

The transaction may not complete during the review process or, should completion occur, the transaction will be deemed void under Irish law. In the case of an adverse finding, the Minister will have wide-ranging powers to modify or terminate the transaction. The Minister may require the parties:

- Not to complete the transaction or specific parts of the transaction;
- To divest themselves of assets, shares or business interests;
- To modify their behaviour in specified ways; and / or
- To prevent the flow of competitively sensitive information.

The parties may appeal the Minister's decision to a panel of adjudicators no later than 30 days after being notified of the decision. The adjudicators' decision may be appealed to the High Court:

- On a point of law;
- With the leave of the court; and
- Within 30 days of the adjudicators' decision.

Commencement and Retrospective Effect

Once the Bill has been passed by the Dáil and Seanad, it will be signed into law by the President. It will then be implemented by Ministerial Order, which is expected in early 2023.

The Bill allows for the Minister to retroactively review transactions that were completed in the 15 months preceding the passage of the Bill into law, regardless of whether the transaction has been notified to the Minister, or falls within the notifiable category.

Notifiable transactions that are proposed but not completed before the Bill becomes law, must be notified within 30 days of either:

- The transaction being completed; or
- The Bill becoming law (whichever is the later date).

Conclusion

It remains to be seen if the Bill will cause significant changes to the FDI landscape in Ireland, or if it will simply become another transaction planning step. What is clear is that the proposed screening process sets a relatively low threshold for deal value and grants wide-ranging powers to the Minister to review both notifiable and non-notifiable transactions. This wide scope and the impact of stalling transactions while the review process is completed could cause significant delays to the completion of affected transactions.

How the Maples Group Can Help

For further information, please reach out to your usual Maples Group contact or any of the persons listed below.

Dublin

Colm Rafferty

Partner and Head of Corporate
+353 1 619 2058
colm.rafferty@maples.com

Patrick Quinlan

Partner
+353 1 619 2059
patrick.quinlan@maples.com

Morgan Pierse

Partner
+353 1 619 2746
morgan.pierse@maples.com

Jordan O'Brien

Of Counsel
+353 1 619 2710
jordan.o'brien@maples.com

William Darmody

Of Counsel
+353 1 619 2721
william.darmody@maples.com

August 2022

© MAPLES GROUP

This update is intended to provide only general information for the clients and professional contacts of the Maples Group. It does not purport to be comprehensive or to render legal advice. Published by Maples and Calder (Ireland) LLP.